FILE COPY

NOV 20 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

SUPPLEMENT TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

PAUL H. RAY,
S. J. QUINNEY,
Counsel for Respondent.

RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

SUPPLEMENT TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

In petitioners' brief it is contended that under the wrongful death statute of Utah the right of action of the heirs or survivors cannot be impaired by anything done or omitted prior to his death by decedent. Petitioners' chief reliance is *Halling* v. *Industrial Commission*, 71 Utah 112, 263 Pac. 78. In respondent's brief in opposition to petition for certiorari, it is contended that the *Halling* case is applicable only in workmen's compensation cases and that there can

be no recovery by the heirs under the wrongful death statute unless the deceased, if he had been living, could have maintained a cause of action. That respondent's contention is correct is now made clear beyond any dispute by decision of the Supreme Court of Utah handed down November 3, 1947, in *Alta J. Van Wagoner, et al.*, v. *Union Pacific Railroad Co.* It was there contended by the plaintiffs that under the wrongful death statute of Utah they had a cause of action for death against the railroad wholly distinct from any cause of action the deceased had in his lifetime, and that, therefore, contributory negligence of the deceased could not be relied upon as a defense against the heirs. In disposing of that contention the Supreme Court of Utah said:

> "Appellants rely on the cases of Mason *v.* U. P. R. R. Co., 7 Utah 77, 24 P. 796, and Halling *v.* Industrial Comm., 71 Utah 112, 263 P. 78, which, in substance, hold that a claim for death is a separate and independent cause of action and is not a continuation of the right of action of the injured party for personal injuries. The death creates a new cause of action for the loss suffered by the heirs by reason of death, and only comes into existence upon the happening of death.
>
> "If we follow the reasoning of these two last cited cases, the conclusion is inevitable that they do not overrule the decision in the Helfrich case. For the purpose of clarifying the statement, assume that the deceased had only been injured in this collision. The right of action would run in his favor, and the defense of contributory negligence would have been properly submitted. The right of action running to the appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if death ensues but it does not say the rights of the third parties are modified, altered, or changed. On the contrary, it bases recovery on the wrongful death by

another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death. This court is of the opinion the legislature did not intend to change the rules of substantive law and deny to litigants the right to defend on the ground of contributory negligence. For the purposes of this suit, all that Section 104-3-11, U.C.A., 1943, grants to the heirs is a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit. The court did not err in submitting this issue to the jury."

The foregoing decision of the Supreme Court of Utah is in full accord with the decisions of this Court in *Northern Pacific* v. *Adams*, *Mellon* v. *Goodyear*, *Kansas City Southern Railway* v. *Van Zant*, and other cases cited in our original brief.

PAUL H. RAY,
S. J. QUINNEY,
Counsel for Respondent.

RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN,
Of Counsel.